Attorney General Douglas F. Gansler Comments on
State Watershed Implementation Plans

I. The Need for the Chesapeake Bay TMDL

The development of the Chesapeake Bay TMDL provides an historic opportunity for Bay watershed states to plan for the future of our Bay and to fully attain the "fishable and swimmable" goals of the federal Clean Water Act. 33 U.S.C. § 1251 *et seq.* Both tidal and non-tidal states will benefit from the restored estuarine habitat essential for protection of unique species of wildlife and from the enhanced recreational opportunities that will result from Chesapeake Bay restoration. After decades of voluntary efforts to restore the Bay to health have repeatedly failed to meet self-imposed deadlines, the Bay TMDL promises an opportunity for real accountability and progress. However, if states continue to devote time and resources to protesting EPA's legal authority to develop and implement the TMDL, instead of crafting responsible and effective watershed implementation plans, both the environment and the people will suffer in what is truly a tragedy of the commons.

Bodies of water and the pollutants that impair them do not recognize political boundaries. Nowhere is that fundamental truth better illustrated than in the Chesapeake Bay watershed. The Chesapeake watershed encompasses parts of six States – New York, Pennsylvania, Delaware, Maryland, Virginia, and West Virginia – and the District of Columbia (collectively "Bay States"). Activities in each of the Bay States contribute to the nutrient pollution impairing the entire Bay, and each of the Bay States therefore has a concomitant duty to rigorously control sources of nutrient pollution within its borders.

The multi-jurisdictional nature of the Bay means it will never attain the fishable and swimmable goals of the Clean Water Act unless all the Bay States, tidal and non-tidal, cooperate with comprehensive federal water pollution control efforts to reduce the flow of nitrogen, phosphorous, and sediment to the Bay.

II. Maryland's Efforts Prior to the Chesapeake Bay TMDL

Maryland has been a leader in restoring the Bay by fully participating, from the onset of the original 1983 Chesapeake Bay Agreement, in multi-jurisdictional efforts at restoration, and developing the tools necessary to evaluate accountability. For example, Maryland is a signatory to the Chesapeake 2000 Agreement,[1] which memorialized the participating governments' commitments to restoring the Bay by setting discrete goals and deadlines for accomplishing them. Among the responsibilities assigned the signatories was the development, with EPA's help, of improved water quality standards for the Bay and the implementation of Tributary Strategies necessary to meet them.

In 2005, Maryland adopted its new water quality standards for the Chesapeake Bay. COMAR 26.08.02.03-3.[2] Consisting of designated aquatic life uses and the water quality criteria necessary to support them, these standards were based on guidance developed by EPA and research and modeling performed by the Bay Program. They are

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[1] www.chesapeakebay.net/content/publications/cbp_12081.PDF.

[2] Maryland is currently in the process of updating certain water quality standards to establish a restoration variance for the Chester River, establish site-specific dissolved oxygen criteria for portions of the Pocomoke River, and to amend designated uses which reflect existing uses by adding the Seasonal Deep Water Fish and Shellfish Use to the South, Severn, and Magothy Rivers, among other amendments. 37 Md. Register 1309 (September 10, 2010).

the product of a collaborative process by EPA and the Bay States and represent a scientific consensus based on the best available scientific findings and technical information identifying the water quality conditions necessary to protect living resources from the effects of nutrient and sediment over-enrichment.[3] The Bay TMDL is being developed to ensure that Maryland's (along with Virginia's and D.C.'s) water quality standards for Chesapeake Bay segments are attained through similar action across the watershed.

III. The Development of Each State's TMDL

Each river, tributary, and other waterbody that is part of the Chesapeake Bay TMDL is included on a jurisdiction's § 303(d) list, meaning that the jurisdiction has identified the waterbody as not meeting applicable water quality standards. For those Chesapeake Bay segments included on Maryland's § 303(d) list, the Bay TMDL represents an important step towards achievement of Maryland water quality standards. While states often develop their own TMDLs for impaired waters entirely within their borders, the multi-jurisdictional nature of the Bay, and the longstanding failure of the states to adequately address Bay pollution, makes EPA's development of this TMDL

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[3] EPA announced its approval of Maryland's water quality standards for the Chesapeake Bay on August 29, 2005. *See* Letter from Jon Capacasa, EPA, to Kendl Philbrick, Sec'y, MDE (Aug. 29, 2005). This approval had the legal effect of rendering the standards "applicable water quality standards for purposes of the Act," which means that they are "the minimum standards which must be used when the [Clean Water Act] and regulations implementing the [Clean Water Act] refer to water quality standards, for example, in identifying impaired waters and calculating TMDLs [total maximum daily loads] under section 303(d), [and] developing NPDES permit limitations under section 301(b)(1)(C)." 40 C.F.R. § 131.21(c) & (d); *see* 33 U.S.C. § 1313(d).

necessary and appropriate. *See Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517 (9th Cir. 1995) (upholding an interstate TMDL EPA established for dioxin on the Columbia River system draining a large multi-state watershed in parts of Oregon, Washington, and Idaho); *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984) (prolonged failure of state to submit TMDLs can constitute "constructive submission" of no TMDLs); *American Canoe Ass'n. v EPA*, 54 F.Supp.2d 621 (E.D.Va. 1999) (failure of state to comply with consent decree may also constitute "constructive submission" of no TMDLs). The TMDL will serve as a guide both in administering the NPDES permitting program and in dedicating resources to the reduction of nonpoint source pollution because it will set the maximum amount of pollution the Bay can receive while still meeting Maryland's water quality standards.

IV. Our States' Shared Responsibilities

As part of the TMDL process, EPA has requested that each state prepare a watershed implementation plan (WIP) to provide reasonable assurance to EPA that sufficient pollution reduction, from both point and nonpoint sources, will take place to meet each state's allocation. EPA intends these WIPs to be management plans under Section 117(g) of the Clean Water Act, which directs EPA's Administrator to "ensure that management plans are developed and implementation is begun . . . to achieve and maintain . . . the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed, [and] the water

quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem." 33 U.S.C. § 1267(g)(1)(A)-(B).

Each Bay State also has a legal obligation to ensure that it does not contribute to a violation of downstream water quality standards. Section 122.44(d) of EPA's NPDES regulations makes clear that each NPDES permit shall include any requirements necessary to achieve water quality standards established under § 303 of the Clean Water Act. Such requirements expressly include limitations for all pollutants "which may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above *any State water quality standard*"—not just those of the State in which discharge occurs. 40 C.F.R. § 122.44(d)(1)(i) (emphasis added); *see also* 40 C.F.R. § 122.2 ("*State* means any of the 50 States . . .") and § 123.25 (making § 122.44 applicable to States that are authorized to implement the NPDES Program).

Unfortunately, none of the draft WIPs has met EPA expectations, and none has been found to be sufficient to ensure that upstream states do not contribute to violations of Maryland's water quality standards. For example, the strategies identified in New York's WIP would exceed allocations by 15% for nitrogen and 14% for phosphorous. Delaware exceeded its target allocations for nitrogen and phosphorous by 17% and 8%; West Virginia by 18% and 6%; and Virginia by 6% and 7%. And, while Pennsylvania met its target allocation for nitrogen, it exceeded its phosphorous target allocation by 11%. By contrast, Maryland's draft WIP met its jurisdiction-wide target allocations for nitrogen, phosphorous and sediment.

The Clean Water Act obligates all Bay States to protect the water quality of the Chesapeake Bay and upstream states are obligated to share in the responsibility to ensure the health of this regionally, nationally, and internationally recognized treasure. *See generally* 33 U.S.C. § 1313. And yet, the New York, Delaware, West Virginia, Virginia, and Pennsylvania draft WIPs, I submit, are inadequate at the most basic level because they fail to identify enough regulatory, enforcement, or even voluntary strategies to ensure downstream water quality standards are met. New York, while claiming that it would be impossible to meet its allocation because of the high percentage of forested land in its watershed area, has the least aggressive standards for major wastewater treatment plants of any WIP. Pennsylvania's WIP contains no plan for addressing the cumulative impacts of non-enforcement of existing regulations for small dairy farms, and did not even specify its plans for modifying its Manure Management Manual to address the significant phosphorous imbalance from over-application of phosphorous-rich animal manure. Virginia has relied heavily on nutrient-credit trading programs in its WIP, but has not identified a sufficient framework for inspections of agricultural best management practices to ensure the proper implementation of nutrient-credit trading.

As Maryland works to incorporate the input of its residents and the constructive criticism of EPA to create a document that will provide reasonable assurances that the TMDL limits will be achieved, I urge all Bay States to do more to meet the jurisdiction-wide target allocations for nitrogen, phosphorous, and sediment that were set forth by EPA. Cleaning up the Bay will not be easy. Tough choices must be made and innovative ideas must come to the forefront. All sectors of the economy, including agriculture, must

comply with best management practices and invest in developing new technologies that will make pollution reduction more efficient. In this first draft, Pennsylvania, New York, Virginia, West Virginia, and Delaware failed to make the hard choices necessary to meet allocations. Each State should revise its WIP to identify pollution reduction programs sufficient to meet EPA allocations.

EPA has articulated a legal framework to reduce Bay pollution with clear support in statute, regulation, and case law. EPA also afforded each Bay state the opportunity to create a plan that would best suit its own ecological, economic, and political needs. Pennsylvania, New York, Virginia, West Virginia, and Delaware may not avoid their legal obligations to ensure that pollution in their state does not contribute to the violation of downstream water quality standards by refusing to engage in the WIP process or by offering facially inadequate plans. I applaud EPA for identifying the inadequate plans and for creating backstop allocations for point sources that will ensure the reductions outlined in the Bay TMDL will be met within a reasonable time period. I also encourage EPA to take every step needed, including: exercising strict oversight of NPDES permits if they fall short of protecting the water quality standards of downstream states; increasing targeted federal enforcement actions against water and air pollution violators in the watershed; exercising residual designation authority to extend NPDES permitting requirements to additional sources, especially within the agricultural sector; and seeking all appropriate remedies available within EPA authority to achieve Bay cleanup.

The Bay will not be restored to health without planning, action, accountability, and enforcement of previous commitments. EPA has articulated a framework and

provided technical expertise to allow the Bay States to make good on over thirty years of commitments to Bay restoration. Each state has the obligation to engage fully in this process and to enhance their draft phase I WIPs to meet EPA expectations. Only by fully participating in good faith can the Bay States achieve the requirements and pollution allocations set forth by EPA in the TMDL, collectively restore the health of the Chesapeake Bay and avoid the ultimate tragedy of the commons.